In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 137

MATSON NAVIGATION COMPANY, a corporation,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

Brief in Support of Petition for Writ of Certiorari.

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The object of this petition is to obtain a review of a judgment of the Court of Claims which was rendered on May 11, 1931 (R. 36), not reported. The judgment dismissed an action instituted by the Petitioner for the payment of the balance of an open and current account between the United States and Petitioner.

The Court of Claims dismissed the action, basing its decision solely upon Section 154 of the Judicial Code (U. S. Code, Title 28, Sec. 260), which reads:

> "No person shall file or prosecute in the Court of Claims or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States."

While other actions are pending in the District Court of the United States, for the Northern District of California in respect of the same subject-matter as is here involved, those actions are against the United States itself. No action is pending in any jurisdiction against "any person * * * acting or professing to act, mediately or immediately, under the authority of the United States" in respect of the subject-matter of this action. The statute deals only with cases where an action is pending against an agent of the government and does not purport to deal in any way with the situation where another action may be pending against the United States itself.

Review by the court is sought under authority of U. S. Code, Title 28, Sec. 288, granting power to review by certiorari on petition of any party a judgment of the Court of Claims. As well as being of extreme importance to Petitioner, the matter is of general interest since the decision of the Court of Claims restricts its jurisdiction contrary to law and extends Section 154 of the Judicial Code beyond its language and intent.

STATEMENT OF THE CASE.

The action was commenced in the Court of Claims on April 6, 1927, to recover from the United States the unpaid balance upon an open, mutual, current and running account between the Petitioner and the United States, arising out of the requisition of seven of the Petitioner's vessels for war use by the United States. On December 29, 1917, written agreements were entered into between the Petitioner and the United States for the liquidation of the just compensation to which the Petitioner was entitled for the use of its vessels (R. 15). As part of the compensation for the use of the vessels the United States agreed to pay to the Petitioner the amount of all increased wages and bonuses in excess of the standard prevailing August 1, 1917, paid to the master, officers and crew of each vessel (R. 21). It is in respect of this provision of the agreements and the items set up in the accounts thereunder that the present dispute arises.

After negotiation the account was finally settled on October 18, 1926. The United States paid the Petitioner the balance of the account excepting the sum of $49,373.11, which represented credits to the Petitioner which the Shipping Board decided had been improperly allowed. This sum represented the amount of increased wages and bonuses over the standard prevailing August 1, 1917, which had been paid to the master, officers and crew of each vessel and was claimed by the petitioner as a part of the just com-

pensation fixed by the agreements. The agreement of settlement (R. 32) reserved to the Petitioner its right to sue for the recovery of this sum of $49,373.11.

On April 7, 1927, after the commencement of the action in the Court of Claims, Petitioner filed in the United States District Court for the Northern District of California seven actions in which recovery of the amounts due under these contracts in respect of each vessel was sought, with the exception that in three of the cases the amounts were reduced to $10,000 in order to come within the jurisdiction of the District Court (R. 38).

ERRORS INTENDED TO BE URGED.

The Court of Claims erroneously construed the statute as depriving it of jurisdiction of this case. The statute deprives the Court of Claims of jurisdiction only where another action is pending "against any person, who at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States". It does not profess or purport to deprive the Court of Claims of jurisdiction where other actions are pending against the United States itself, leaving such actions to be disposed of in accordance with the usual rules respecting abatement of action where another action is pending between the same parties involving the same subject-matter.

ARGUMENT.

THE STATUTE IN TERMS IS INAPPLICABLE TO THE SITUATION HERE PRESENTED.

The statute deprives the Court of Claims of jurisdiction only where another action is pending against "any person, who at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately under the authority of the United States". Nothing is there said in respect of another action pending against the United States itself, as to which a plea in abatement is available.

This court in *Corona Coal Co. v. United States*, 263 U. S. 537, 540, had occasion to construe this section. Pending an appeal from a decision of the Court of Claims dismissing an action for the value of coal requisitioned by the Fuel Administration, the plaintiff commenced an action against the Director-General of Railroads in respect of the same matter. The government's motion to dismiss the appeal because of the provisions of Section 154 of the Judicial Code was granted, the court saying:

> "At the time the alleged causes of action arose the President was acting under the authority of the United States, and the actions, being against an agent appointed by and acting for him, fall within the terms of the statute just quoted. It is urged, however, that the actions were brought ex necessitate rei, because they were about to become barred by expiration of the statutory period of limitation, and that, for this and other rea-

sons, the case is not within the spirit of Section 154, properly construed. But the words of the statute are plain, with nothing in the context to make their meaning doubtful; no room is left for construction, and we are not at liberty to add an exception in order to remove apparent hardship in particular cases."

It will be noted that the court found the statute to be applicable, the second action *"being against an agent* appointed by and acting for him (the President)."

Not a single case has been found where this statute has been held applicable where the two cases are brought against the United States itself, and in fact the Court of Claims has itself held that the statute is inapplicable where both cases are against the United States.

In *Peterson v. United States,* 26 Ct. of Cl. 93, an action was brought in the Court of Claims, although a prior action involving the same issues had been instituted in the District Court. The court held that the action should not be dismissed, but should be abated pending determination of the litigation in the District Court. Such is the course that should have been pursued in this case. The present action, being the first commenced, should proceed and the actions in the District Court be abated pending this determination.

In the *Corona Coal* case, which is the only case cited by the Court of Claims in support of its ruling, this

court held, in respect of Section 154 of the Judicial Code:

> "* * * the words of the statute are plain, with nothing in the context to make their meaning doubtful; no room is left for construction, and we are not at liberty to add an exception in order to remove apparent hardship in particular cases."

Since the language of the statute is plain and "no room is left for construction" to add an exception to the act to avoid hardship in particular cases, we submit that the same language leaves no room for an extension of the statute to impose a hardship in this case.

EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS.

While the plain meaning of the language used in the statute precludes any resort to rules of statutory construction, if any such rule might be resorted to, it is that of *"expressio unius est exclusio alterius"*.

Colyer v. Skiffington, 265 Fed. 17, 45;
Johnson v. Southern Pac. Co., 117 Fed. 462, 465.

Section 154 of the Judicial Code particularly specifies the conditions upon which it shall become applicable to a suit in the Court of Claims, to wit: a suit against an agent of the government. It impliedly excludes all other conditions, including the pendency of a suit against the United States itself.

THE STATUTE CANNOT BE EXTENDED BY IMPLICATION.

The Act creating the Court of Claims (10 Stats. L. 612, Ch. 122) vested it with general jurisdiction of claims against the United States. Section 154 of the Judicial Code is a restriction upon that jurisdiction under particular circumstances. Being in derogation of the statute vesting the Court of Claims with jurisdiction in actions such as here involved, its scope is not to be extended by implication beyond its clear terms. Particularly, is this true where, as in this case, the statute would be applied in a situation not within possible contemplation when the statute was enacted.

United States v. Barnes, 222 U. S. 513, 520.

THE HISTORY OF THE ACT SHOWS THAT CONGRESS DID NOT INTEND THAT IT SHOULD APPLY TO THE SITUATION HERE PRESENTED.

While we still believe that the language of the statute is so clear that "no room is left for construction", if the statute requires extrinsic aid for interpretation, the debates in Congress show that the act is inapplicable in the present situation.

In explaining the purpose of the bill which was enacted in 1868 (15 Stats. L. 77) and which subsequently became Section 154 of the Judicial Code, Senator Edmunds, Chairman of the Judiciary Committee, in reporting the bill to the Senate, said:

"The object of this amendment is to put to their election that large class of persons having cotton claims particularly, who have sued the Secretary of the Treasury and the other agents of the Government in more than a hundred suits that are now pending, scattered over the country, here and there, and who are here at the same time endeavoring to prosecute their claims, and have filed them in the Court of Claims, so that after they put the Government to the expense of beating them once in a court of law then can turn around and try the whole question in the Court of Claims. The object is to put that class of persons to their election either to leave the Court of Claims, or to leave the other courts. I am sure everybody will agree to that."

Congressional Globe, Second Session, 40th Congress, 1867, 1868, p. 2769.

The bill was adopted without further discussion in Congress.

The statute was directly aimed at the practice of simultaneously maintaining an action against the United States and an action against its agents or officers in connection with the same grievance.

At the time the statute was enacted the only jurisdiction in suits against the United States was in the Court of Claims, and it was not until 1887 that the Tucker Act (24 Stats. L. 505, Ch. 359, Secs. 1 and 2) gave concurrent jurisdiction to the district courts in respect of certain actions against the United States. The statute, therefore, could not possibly have been

intended to apply in respect of two actions against the United States pending in different courts.

It is apparent, therefore, that the purpose and policy of the Act was to compel an election between two different remedies and not to compel an election between two different forums in which the same action might be prosecuted against the United States.

The plain language of the statute which leaves no possible room for the construction given thereto by the Court of Claims aptly expresses the sole intent and purpose disclosed by the history of the act.

NO REASON EXISTS FOR APPLYING SECTION 154 OF THE JUDICIAL CODE TO THE SITUATION HERE PRESENT.

While an action by a private individual against an agent of the United States is not a bar in a subsequent action by the United States against the same individual involving the same subject-matter, (*Carr v. United States,* 98 U. S. 433; *United States v. Lee,* 106 U. S. (16 Otto) 196; *Tindal v. Wesley,* 167 U. S. 204) and a judgment in favor of a litigant against an agent of the United States is not a bar to an action by the same suitor against the United States itself, (*Sage v. United States,* 250 U. S. 33) a judgment in an action between the United States and any other party creates a Bar by estoppel in any subsequent proceeding between the United States and the same party involving the same issues.

Southern Pacific R. R. v. United States, 168 U. S. 1.

In view of these rules it is evident that a definite reason existed for the adoption of the Act constituting Section 154 of the Judicial Code. It was entirely appropriate that any claimant desiring to avail himself of permission to sue the government be denied the right to prosecute at the same time an action upon the same subject-matter against the agent of the government and thereby in effect oblige the government to try twice the issues involved. Since, however, the judgment in any action against the United States bars any subsequent action upon the same claim, the existence of more than one action against the United States upon the same claim creates no risk of twice defending against the claim and there is no occasion to apply the rule of Section 154 of the Judicial Code.

Appropriate procedure has always existed to protect the United States against any embarrassment arising out of the maintenance of two actions against it involving the same subject-matter.

It frequently happens that out of an excess of caution, suits involving the same subject-matter and the same parties may be commenced in two or more courts which have jurisdiction. In such a case it is well established that the second action may be abated pending the determination of the first. The second action is not thereby dismissed but remains in abeyance pending a final judgment in the first action, and when judgment is rendered in the first, it is *res adjudicata* as to the abated action or any subsequent action between the same parties. Such is the proper course for the United States to pursue in this proceeding. The action in the Court of Claims was the

first action commenced. The actions subsequently commenced in the District Court in California may be abated pending the determination of the action in the Court of Claims. In this way the rights of both parties are protected, plaintiff is enabled to obtain a decision of its case on the merits and the government is not subject to the trouble or expense of twice defending the same claim.

In the Court of Claims it is possible to try the entire matter in dispute in a single action. Trial of these issues in the District Court would involve a separate trial as to each vessel involved.

The merits of the claim have already been determined adversely to the government in *New York and Porto Rico S. S. Co. v. United States*, 29 Fed. (2d) 1013, affirmed by the Circuit Court of Appeals in 29 Fed. (2d) 1014.

CONCLUSION.

It is respectfully submitted that the decision of the Court of Claims dismissing Petitioner's action for lack of jurisdiction, based upon the provisions of Section 154 of the Judicial Code, is erroneous and should be reviewed by this court, since:

(1) The statute by clear terms requires such dismissal only where another action is pending against a person acting for or on behalf of the United States in respect of the same subject-matter, and does not in terms apply to another action pending against the United States itself;

(2) The purpose of the statute was to avoid a multiplicity of actions where the judgment in one could

not be pleaded in bar of the other, and where the one action was not subject to abatement during the pendency of the other, a situation not present in the instant case;

(3) The history of the legislation shows that it was intended only to prevent the simultaneous maintenance of a suit against the government's agent and a suit against the United States itself, and was not intended to apply to separate suits against the United States, as to which the ordinary rules of *res adjudicata* and of abatement of actions amply protect the government;

(4) The statute was passed at a time when an action against the United States could be prosecuted only in the Court of Claims, and therefore could not have been intended to apply to a case where another action against the United States was pending in another court, as subsequently permitted by the Tucker Act.

It is respectfully submitted that the writ of certiorari should be granted.

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Memorandum Replying to Respondent's Brief In Opposition.

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Memorandum Replying to Respondent's Brief In Opposition.

The object of this proceeding is to obtain a review of a judgment of the Court of Claims (R. 36) dismissing the proceeding in that court upon a construction of an Act of Congress (Section 154 of the Judicial Code, U. S. Code, Title, 28, Section 260), which petitioner claims is erroneous and which the respondent does not attempt to justify. On the contrary, respondent admits in its brief (pp. 4, 5)—

> "That it is doubtful whether this decision of the Court of Claims is correct. The question never seems to have been decided before and we should be disinclined to oppose the petition if it would be necessary to decide this question upon a review of the case."

However, respondent suggests that the Court of Claims might have dismissed the action upon another ground which is presented to this court for consideration in another proceeding (*United States v. Olympia Shipping Corporation,* No. 85, October Term, 1931), and the respondent requests that disposition of such other proceeding govern the disposition of petitioner's application here.

This request of respondent fails to appreciate the fact that an opinion which contains a statement of law which, to say the least, is of doubtful correctness, should not be permitted to stand without review by this court. If the writ of certiorari should be denied, the opinion of the Court of Claims would remain the only judicial expression on the subject and establish, as a binding precedent for the Court of Claims, an erroneous construction of Section 154 of the Judicial Code.

The suggestion of the United States that the petitioner's application should be made to depend upon the action of this court in *United States v. Olympia Shipping Corporation* has no merit, since the present proceeding and the Olympia case are not similar. The dissimilarity between these cases appears not only

in the pleadings but in evidence introduced in the Court of Claims in this case, which is not a part of the record. Had the record in this case the evidence introduced by the Court of Claims on the subject the dissimilarities between the present case and the Olympia case would be obvious.

It is respectfully submitted that the respondent has suggested no good reason for deferring favorable action upon the petitioner's application for a writ of certiorari.

Respectfully submitted,

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